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Case Nos: 2005LHC01252, 2005LHC01253, 2005LHC01254 and 2005LHC1255

OWCP Nos: 01-135322, 01-104835, 01-103495 and 01-125185

In the Matter of:

DB,
Claimant,

v.

ELECTRIC BOAT CORPORATION,
Employer.

DECISION AND ORDER

This proceeding arises from a claim under the Longshore and Harbor Workers Compensation Act ("the Act"), as amended, 33 U.S.C. Section 901 *et seq*. Claimant sought compensation for benefits from Electric Boat Corporation ("Employer"). A formal hearing was held in this case on September 14, 2005, in Groton, Connecticut. Claimant submitted exhibits 1 through 18; Employer offered exhibits 1 through 14.[1] All exhibits were admitted into evidence without objection.[2] The parties presented stipulations, which were received into evidence and marked as Administrative Law Judge Exhibit 1. Both parties filed post-hearing briefs. The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

ISSUES

[1] The following abbreviations will be used as citations to the record:
EX – Employer's Exhibits
CX – Claimant's Exhibits
TR – Transcript

[2] Employer submitted two post-hearing vocational expert depositions. The deposition of Micaela T. Black is marked for identification as EX-15. The deposition exhibit appended to EX-15 is marked for identification as EX-15A. The deposition of Cherie L. King is marked for identification as EX-16. The deposition exhibit appended to EX-16 is marked for identification as Ex-16A. The post-hearing exhibits are received into evidence without objection.

1. Is Claimant entitled to an award of temporary total disability?

2. If Claimant is not entitled to an award of temporary total disability, is he entitled to an award of temporary partial disability?

3. Has Claimant been denied reasonable medical care by Employer for his work-related injury?

STIPULATIONS

Employer and Claimant stipulated to, and I find, the following facts:

1. The Longshore and Harbor Workers' Compensation Acts applies to all claims.

2. Claimant sustained work-related injuries on June 28, 1988, September 10, 1992, and October 1, 1995.

3. There existed an employer/employee relationship at all relevant times.

4. Claimant filed a timely notice of the injury.

5. Claimant filed a timely claim for compensation under the Act.

6. Employer filed a timely Notice of Controversion and a timely First Report of Accident for the neck injury.

7. Claimant's injuries occurred in the course and scope of Claimant's employment.

8. Claimant's average weekly wage for the October 1, 1995 injury was $1,029.00.

9. Claimant's average weekly wage for the September 10, 1992 injury was $821.17.

10. The parties further stipulated that Claimant has been paid the following benefits:

    (a) On the 1988 claim, the claimant was paid under the Longshore Act temporary total from 7-18-1988 to July 10, 1991 in the amount of $62,011.12, and temporary partial during part of 1991 in the amount of$1,345.59.Paid medical benefits totaled $18,111.69. Under the State of Connecticut's Compensation Act, Claimant was paid permanent partial disability totaling $9,615.15.

    (b) On the 1992 claim, Claimant was paid periods of temporary total during 1992 totaling $1,798.73 as shown in EX-3. Medical expenses of $8,479.04 were paid on this claim.

(c) On the 1995 claim, Claimant was paid permanent partial benefits and periods of temporary total, and temporary partial benefits from 10-2-95 through 4-14-04 totaling $233,308.94 as shown in EX-2 The permanent partial benefits for 15% of the leg in the amounted to $28,808.35. The amount of temporary total and temporary partial paid on this claim was $204,500.59. EX-2 Medical expenses of $21,131.58 have been paid on this claim. The amount Temporary total benefits paid under this claim from 4-6-99 through 4-14-04 totaled $128,910.03.

TR 6-8, EX-1, EX-2

SUMMARY OF THE FACTS

Testimony of Claimant

Claimant is 64 years old and is married. He completed the eleventh grade. Claimant began working for Employer in December 1976 as a welder. While working in this capacity, Claimant received training related to various welding qualifications. In late 1979 or early 1980, Claimant sustained a work-related left knee injury. Work restrictions related to this injury caused Claimant to be unable to perform the requisite climbing essential to shipboard welding. He was reassigned to work in the tool room as a tool room attendant. His job was to issue tools to the various shipyard trades. He performed this job until October 1, 1995 (TR 13-15).

Claimant testified that he has had several other work related injuries. In June 1988 Claimant injured his neck and right shoulder while moving a drilling machine. Initially, he treated with Dr. Zeppieri, an orthopedist. He was referred to another orthopedist, Dr. Matza, who had previously treated Claimant. After extensive treatment and physical therapy, Claimant was eventually released to full duty by Dr. Matza as a tool room attendant sometime in 1991 (TR 18-23).

On September 10, 1992, Claimant suffered another work-related injury. He fell through a hole injuring his right elbow, shoulder, neck, back, ribs and right calf. Claimant was initially treated by a chiropractor and attempted to return to work. Eventually Claimant was treated by Dr. Matza on October 5, 1992. Dr. Matza excused Claimant from work for about two weeks. Dr. Matza treated Claimant during this period. Claimant also received physical therapy. Dr. Matza placed Claimant on work restrictions and treated Claimant for these injuries until he injured his knee in 1995. Even after his subsequent 1995 knee injury, Claimant experienced recurrent neck and back and shoulder problems (TR 23-32).

In early January 1998, Claimant began treating with Dr. Browning for his neck, back and shoulder injuries. He treated regularly with Dr. Browning for a couple of years. Dr. Browning referred prescribed an MRI of Claimant's neck and shoulder. He also ordered an x-ray of Claimant's neck. Dr. Browning eventually referred Claimant to Dr. Abramovitz, a neurologist (TR 31-32).

Dr. Abramovitz treated Claimant sporadically from 2000 through 2004, during which time Claimant's neck and back continued to bother him. Claimant recalled that following a neck

flare-up in 2003, another MRI was performed. Dr. Abromovitz reviewed it and examined Claimant. According to Claimant, Dr Abramovitz recommended further diagnostic tests which Employer refused to permit. Claimant insisted that Employer refused to pay Dr. Abramovitz' for over a year. Dr Abramovitz denied Claimant treatment because of this ((TR 32-36).

At the time of the hearing, Claimant was again treating with Dr. Matza for his neck and back. He had not seen Claimant for almost nine or ten years between 1995 and 2005. Claimant noted that Dr. Matza believes Claimant is not capable of gainful employment. Dr. Matza had recently ordered another myelogram because he was concerned with Claimant's lower back. According to Claimant the myelogram was scheduled three times but was never performed because Employer again refused to either authorize or pay for it (TR 32-39, 69-70).

Claimant testified regarding his position with the Central Connecticut Horseshoe Club. Claimant testified that the "club" was formed back in 1996 or 1997. This is an indoor facility with six horseshoe pits. It enables people to play horseshoes in the winter (TR45, 77). Claimant designed the indoor horseshoe pits himself. He stated, "I had welding experience and what have you. I managed to do a lot of it on my own, welding of the horseshoe stakes when we placed it, they were—they have to be designed completely different than ones that are driven into the ground outdoors. There is a complete rather unique design I came up with as a matter of fact to secure them into the floor in an indoor facility" (TR47). Claimant also wrote a computer program which allows individuals to keep score and save the files on a network (TR47). Claimant testified that the "club" is not incorporated as a separate legal entity. It does not file tax returns. Claimant stated that at the time of the hearing, there were about 75 members, who each pay dues of $50 per year. The facility is open from October to the end of April (TR58). There is league play during the week and tournaments every other weekend. Claimant testified that the weekly league play and biweekly tournaments are the primary source of revenue for the operation (TR 45, 46).

Claimant testified that his name appears on the present lease. In addition, he is the individual who pays all of the bills. Claimant also agreed that he has control over the deposits and the bank accounts for the club (TR 47).

Claimant stated that the club has "authorized" the reimbursement of his travel expenses. (TR 51). In addition, he testified that he is at the club every day it is open between October and April. Claimant also admitted that it is a 44.7 mile one way drive to get from his home to the Horseshoe club (TR 57). Although Claimant acknowledged that he often worked 7 days per week, he downplayed the actual amount of work he did at the club. His testimony suggests that his time at the club is spent more on such things as making coffee, shooting the breeze, hanging around, watching television and napping. He denied doing any physical labor any more. Although he acknowledged that he did help set up for the evening events, he characterized it as consisting of four minutes of saving the previous evening's score files to his computer and less than another five minutes of computer work setting up score files for the coming evening (TR 48-51). Claimant also downplayed his computer skills notwithstanding his ability to design a computer program and create a computer network for the horseshoe club (TR55-58). Although he acknowledged handling all of the club's finances and balancing the club's books, Claimant insisted that "I have no duties thereby the way. Whatever I take on, is what responsibility I've

taken on, but I have no—I have nobody to answer to as far as what I do or don't do or how I do it" (TR72).

Claimant admitted he is the only individual with access to the Horseshoe club accounts. He testified that if the property of the Horseshoe club were liquidated, he would get the funds. (TR 59). Claimant's bank records for the years 2001 through 2004 were admitted as exhibits. EX-11-14). In each of these years there is a personal account and an account for the Central Connecticut Horseshoe club. A review of the financial records shows that in the year 2001 there was a positive cash flow of $2,697.07 in the "Horseshoe" account. In 2002, there was a negative cash flow of $1,563.97 in the "Horseshoe" account. In 2003, there was a negative cash flow of $867.80 in the "Horseshoe" account and in 2004 there was a positive cash flow of $7,986.07.

A review of the details of the account shows that the "Horseshoe" account pays for the claimant's commute from his home to the horseshoe club. Claimant admitted that in 2004 the amount "reimbursed" for gas was almost $1,800. Claimant also agreed that there may be over $1,000 payable to auto parts supply companies (TR 61).

Claimant conceded that he uses the ATM card associated with the Horseshoe account for personal withdrawals. Finally, Claimant admits that the Horseshoe account is in fact, his account and that all of the revenue from the "Horseshoe Club" is deposited into that account. Furthermore, he stated that if the club disbands, the "members" would have no rights to get back any of the money they had paid for dues. Claimant also agreed that the club has never audited the clubs books (TR 62, 63, 64, 72).

Claimant indicated that at present, individuals pay $12 per night for league play. There are *5* league nights. There are typically twenty people playing each league night (TR. 78, 79). The club is open from October to April, a seven month period, or 30 weeks. There are also tournaments every other weekend. There are up to 11 tournaments in a year. Each tournament contestant pays $15. However, non-members pay $20 for the tournament. Claimant stated that the average tournament had 35 people playing (TR 84, 85, 87, 88). As stated previously, there are 75 members who pay $50 per year. Therefore, Claimant takes in $3,750 for "dues". He takes in up to $36,000 for league play (100 entries per week x $12 x 30 weeks) In addition Claimant takes in between $5775 (all paying $15) and $7,700 (all paying $20) for tournaments. The "club" averages revenues of about $45,000 for a seven-month period. This would average $6,500 per month in deposits. In 2004, the "club" had deposits of $7,470 in January, $8,643.14 in February, $3,800 in March, $7,103 in April, $3,700 in May, $ 1,484.27 in July, $1,562 in September, $6,305 in October, $6,600 in November and $5,314 in December. EX-14. For the seven months of January to April and October to December, the deposits totaled $45,235.00 (the amount estimated based on Claimant's testimony regarding tournaments and league play). For expenses, Claimant had rent at $15,000 per year plus utilities and expenses related to running the tournaments and leagues. The records indicate that 2004 is by far the best year for the business. The records reflect that deposits in 2001 were almost $28,000. In 2002 deposits were down to almost $23,200. But in 2003 deposits had rebounded to almost $32,000. Claimant testified that most of the money generated by the "club" is in cash. Therefore, there is no record of the actual receipts, just what is deposited into the account.

Claimant maintains that he has tried to obtain work. He has a Class 1 driver's license

which allows him to drive a tractor trailer truck. A friend offered him a job; however, because he could not tolerate more than three hours at one time sitting in the truck, he did not get the job. (TR44). Claimant insisted that although he has computer skills, he would not be competitive for a job "with some young kid coming out of school with a computer science degree" (TR56). Claimant conceded that he has never attempted to look for work as either a customer service representative, a cashier in a retail establishment or an inventory-clerk . He has not applied for jobs at either Mohegan Sun Casino or Foxwoods Casino. He has never applied for work at any of the area hotels. He has not applied for work at a Blockbuster Video Store (TR68-69). He admitted that since leaving the shipyard in 1995, he has only "interviewed for a couple of jobs" (TR41).

Medical Evidence-Dr. Matza

Dr. Matza is a board-certified orthopedic surgeon. CX-3, p.4; CX-5. Claimant started treating with Dr. Matza in 1983 for a work-related left knee injury[3]. Dr. Matza performed arthroscopy on the knee. CX-3, p.6; CX5. Dr. Matza treated Claimant in 1985 for work-related right elbow pain. CX-3, pp.6-7;CX-5. In 1986 and 1987, Dr. Matza treated Claimant for a work-related ankle sprain which later required surgery. CX-3, p.7; CX5. In 1988, Claimant suffered a work-related neck and right shoulder injury.[4] Dr. Matza took over Claimant's treatment and treated Claimant for a C5-6 disc herniation. In the summer of 1991, Claimant was released to work. CX-5. By April 8, 1992, Claimant's cervical problems were improved and Claimant's condition was satisfactory. CX-5. On August 24, 1992, Dr. Matza released Claimant from further medical treatment.

On September 10, 1992, Claimant sustained another work-related injury when he fell into a hole and landed on his right elbow jamming his right shoulder. Claimant also complained of neck low back and right knee pain. Claimant was first treated by a chiropractor. Dr. Maza saw Claimant on October 5, 1992. He diagnosed "resolving right elbow contusion, resolving left knee sprain, low back strain improved with cervical strain and spondylosis with aggravation of C5-6 disc degeneration with right shoulder impingement syndrome". He also noted a rotator cuff tear. (CX-3, pp.11-12; CX-5). Claimant returned to work and worked on and off till 1995. Dr. Matza predominantly provided Claimant with diagnostic treatment, conservative treatment with physical therapy and medications and exercise until early 1995. CX-3, pp.7-8; CX-5. No surgery was performed on Claimant's back or neck. Dr. Matza last treated Claimant for his cervical disc and right shoulder impingement syndrome on February 27, 1995. CX-5.

On March 30, 2005, Dr. Matza next saw Claimant. Claimant's complaints and symptoms were consistent with those after the 1992 injury. The neck and back pain appeared to have been exacerbated. CX-3, p.12; CX-5. On April 27, 2005, Dr. Matza saw Claimant again. By this time he had reviewed MRIs for 2000 and 2003 which revealed further cervical disc degeneration. He took Claimant out of work and prescribed medications. CX-3, pp.13-15; CX-5. Dr. Matza again saw Claimant on June 8, 2005. By then he had reviewed a November 2004 MR I of Claimant's lower back. It showed multiple lumbar disc bulges and disc degeneration.. He recommended a CAT scan and a myelogram of the back. The myelogram would be useful in

[3] By this time, Claimant was already working in a light-duty capacity as a tool room attendant.
[4] Claimant began treating with Dr. Zeppieri.. Dr. Zeppieri referred Claimant to Dr. Matz. CX-16.

showing where any nerve root was being compressed and causing pain. Cx-3, pp.15-17. In a letter dated April 27, 2005, Dr. Matza specifically stated that Claimant's cervical, right shoulder, low back and knee injuries are caused by a natural progression of Claimant's 1992 work-related injury. He found Claimant unable to work at any substantial job. CX-3, pp. 17-18; CX-5. Dr. Matza noted that there was a good possibility that Claimant may need surgery to his back or neck. He further noted that neither the myelogram nor the CAT scan has been done. . In his opinion both are essential prior to determining the exact nature of the surgery to be done. CX-3, pp.19-20.

During his deposition, Dr. Matza reaffirmed his belief that Claimant's problems progressed form his 1992 injury at the shipyard. CX-3, p.21. With regard to Claimant's ability to work, Dr. Matza was unaware that Claimant drove between five and seven days per week between the fall and the late spring from his home in East Hartford to the indoor horseshoe facility. Moreover, Dr. Matza was unaware how many hours per day he spent there. Moreover, Dr. Matza was not aware Claimant would sometimes spend all day at the facility organizing tournaments. Nor was he aware of what activities took place there or whether Claimant made any money from these activities. However, Dr. Matza believed Claimant was still totally disabled because it was his impression that Claimant "wasn't really doing anything, just kind of supervising" and could alter his activity at any given moment and lie down." CX-3, pp. 22-26.

Medical Evidence-Dr. Salkin

In early October 1995, Claimant suffered a work-related right knee injury. On October 26, 1995, Claimant began treating with Dr. Salkin, an orthopedist. CX-12. In mid-December 1995, Dr. Salkin performed arthroscopic surgery on Claimant's right knee for a posterior horn medial meniscus tear and chondramalacia. Claimant continued treating with Dr. Salkin. In early 1996, Dr. Salkin diagnosed peroneal nerve compression in the right knee which was causing Claimant pain. Dr. Salkin found this to be work-related. Claimant underwent a second knee operation in early November 1998. Dr. Salkin performed a peroneal nerve release. Dr. Salkin last treated Claimant on November 17, 1998. CX-12.

Medical Evidence-Dr. Browning

Dr. Browning began treating Claimant on November 24, 1997 CX-10. Dr. Browning is an orthopedist. He next saw Claimant on January 19, 1998 after a cervical MRI was performed. CX-9. The MRI showed significant disc bulge at C5-6 and C4-5. He noted "[a]ll in all, multiple injuries. The area that may require something will be the cervical spine." CX-9. On March 30, 1998, Dr. Browning noted "Since he was age 55, he opted for early retirement, and at the present moment, he manages an indoor horseshoe facility." CX-9. On February 16, 1999, Dr Browning noted that Claimant had two injuries to his left knee. He agreed that a 20% impairment rating was reasonable. He noted Claimant's right arm was fractured on January 28, 1987 and that his right shoulder was injured on September 10, 1992. He noted Claimant's continuing neck and

back problems. In addition, Dr. Browning assigned work restrictions.[5] The medical reports show that by February 8, 2000 Dr. Browning became so concerned about Claimant's cervical spine condition that he referred Claimant to Dr. Abramovitz. CX-9. He last saw Claimant on February 8, 2000. He noted that Claimant's cervical spine had spur at C5-6 and Claimant's had a rotator cuff rupture. He also assigned work restrictions.[6] On February 9, 2000 Dr. Browning wrote two letters.[7] Dr. Browning noted that Claimant had two major problems. First, the MRI showed cervical spinal stenosis from C4-6 and actual impingement into the spinal chord at C5-6. In addition, he found a shoulder rotator cuff tear which would require surgery. However, he opined that the cervical problem was the most crucial to address. He stated "I think that this is the worse (sic) cervical spine stenosis that I've seen since MRI became available to us in 1993." CX-10. He decided to refer Claimant to Dr. Abramovitz because of his surgical expertise in the neck. CX-10.

Medical Evidence-Dr. Abramovitz

Dr. Abramovitz began treating Claimant on February 14, 2000. CX-7. He noted that the recent cervical spine MRI showed degenerative changes at C4-5 and C5-6; however, the spinal chord was not significantly restricted. Dr. Abramovitz did not recommend surgery at that time. He did prescribe medicine to relieve Claimant's symptoms.

He again saw Claimant on September 3, 2003. CX-7. Another MRI showed "small disc protrusion at C4-5 with some restriction of spinal canal diameter, left more than right. At C5-6 there is also considerable disc degeneration." Dr. Abramovitz noted Claimant's neck pain syndrome was probably related to abnormality seen on the MRI. He further noted that Claimant has had several episodes of near syncope with vertigo (dizziness almost to the point of blacking out or fainting). He stated that "these always occurred in the upright position, but not particularly with changes of position. Neck movements were not associated with onset of symptoms." The dizziness seemed to be associated with Claimant's neck pain. However, because there did not appear to be any connection of the dizziness with head movement, it did not suggest that the dizziness was caused by spondylotic compression of the vertebral arteries. Claimant indicated that he had a similar episode about six years ago. Dr. Abramovitz recommended an intracranial/extracranial MRA (Magnetic Resonance Angiogram) to better determine whether there was a connection between the dizzy spells and Claimant's work-related cervical problems. The medical records do not reflect that an MRA was ever administered. As stated previously, Claimant insisted that Employer denied the MRA request by Dr. Abramovitz.

By letter dated July 29, 2004, Dr. Abramovitz still did not consider Claimant a candidate for surgery. CX-7. He saw Claimant again on September 20, 2004. CX-7. He noted Claimant's two major problems were his cervical degenerative disc disease of the neck and lumbar disc disease of the lower back. Dr. Abramovitz opined that it would be very unlikely that any employer would hire Claimant due to: 1) Claimant's neck and low back problems; 2) the amount

[5] The work restrictions included avoiding prolonged walking, repetitive bending, squatting/stooping, crawling, climbing ladders, repetitive stair climbing, kneeing, twisting, prolonged standing, reaching above right shoulder, working in confined spaces, lifting no more than 20 lbs., pushing and pulling no more than 25 lbs.
[6] The restrictions were virtually the same as those assigned by him in 1999 (See footnote 5).
[7] One letter is to Dr. Abramovitz and one is to National Employers Company.

pain medication Claimant takes; and 3) the fact that Claimant has been unemployed for almost nines years.

Medical Evidence-Dr. Willetts

Dr. Willetts filed three medical reports dated January 29, 1999, March 27, 2002 and July 28, 2005 respectively. EX-6, EX-7, EX-8.

On January 29, 1999, Dr. Willetts evaluated Claimant for his elbow, back, neck, shoulder and both knees. EX-6. Dr. Willetts noted that Claimant mentioned ongoing right shoulder and neck pain, ongoing right ankle instability, ongoing right knee pain and some occasional lower back discomfort. Dr. Willetts noted in his social history that Claimant had recently started his own business, the Central Connecticut Horseshoe Club. Dr. Willetts noted that Claimant advised him that the business was quite active and he was doing considerable computer work. Dr. Willetts stated that in his opinion, Claimant had no impairment to the right elbow. In addition, with respect to the lumbar spine, Dr. Willetts stated that Claimant had no impairment of the lumbar spine. With respect to the cervical spine, Dr. Willetts gave a 14% impairment stating that half of the impairment predated the injury of June 22, 1988 and half was attributable to the injury of June 22,19886. Dr. Willetts assigned a 1% impairment to the right shoulder. Dr. Willetts assigned a 9% impairment to the right knee related to the partial meniscectomy and joint space narrowing plus an additional 5% impairment for the peroneal nerve entrapment. Dr. Willetts gave a10% impairment to the left lower extremity and 10% impairment to the right foot. Dr. Willetts assigned work restrictions as a result of the cervical spine injury, the right shoulder injury, the right knee injury, and the left knee injury. Restrictions for the right ankle would be the same as the right knee.

Dr. Willetts examined Claimant again on March 27, 2002. EX-7. Dr. Willetts noted that Claimant stated that his physical condition was essentially unchanged since his last visit. Dr. Willetts again noted that Claimant informed him that he worked at his own business, operating an indoor horseshoe arena and that he worked 10 to 12 hours per day at the horseshoe club. Claimant advised Dr. Willetts that the business was now "paying for itself'. With respect to Claimant ability to work, Dr. Willetts stated that Claimant could return to regular duty work with respect to his back condition and his right knee condition. Dr. Willetts also stated that Claimant had restrictions on his ability to work that were due to the cervical spine and right shoulder injuries. Dr. Willetts reiterated that Claimant was at MMI for the back and right knee injuries.

Dr. Willetts examined Claimant again on July 28, 2005. EX-8. Claimant admitted that in 2002 he had told Dr. Willetts that he worked 10 to 12 hours per day and was anticipating better profits at his horseshoe business. However, at the 2005 examination, Claimant insisted that it was more of a horseshoe club than a business and that his participation was of a minimal nature. Dr. Willetts stated in 2005 that Claimant had a number of conditions. With respect to the cervical spine, Dr. Willetts stated that Claimant now had a 20% impairment of the cervical spine and noted that this was due to the injury in the 1970's, the 1988 injury and, if the claimant's history was correct, to the 1992 injury. With respect to the low back, Dr. Willetts stated Claimant now had a7% impairment. Dr. Willetts stated that Claimant had a 3% impairment to the right arm. With respect to Claimant's right knee, Dr. Willetts stated that the permanent impairment was

4%. Finally, Dr. Willetts stated that Claimant's left leg carried a 10% impairment.

Dr. Willetts stated that the claimant could not return to work at his prior occupation at Electric Boat Corporation. Claimant's restrictions are based on his cervical spine injury, the right shoulder injury, the low back injury and both knee injuries. The restrictions included avoiding working in tight compartments with low ceilings, lifting more than 10 pounds, avoid pushing or pulling more than 25 pounds with the right arm, avoid frequent, repetitive bending or twisting and avoid more than occasional squatting, kneeling and avoid crawling. Dr. Willetts further opined that Claimant was still capable of limited duty work EX-8.

Vocational Evidence-March 6, 1999 Labor Market Survey

On March 16, 1999, Senior Vocational Case Manager Kent Moshier prepared a Labor Market survey for Concentera Managed Care Inc. in regard to Claimant. EX-16A. The vocational expert used the restrictions from Dr. Willetts' January 29, 1999 report (EX-6) and Dr. Browning on February16,1999 (CX-9) Making employer contacts the vocational expert concluded that the claimant was capable of performing non-skilled sedentary to light duty jobs as a Restaurant Host, Cashier, Hotel Clerk or Telemarketer. The vocational counselor found twenty job openings. The vocational counselor noted that in 1995 wages, the claimant would earn between *$5.25* and $7.50 per hour up to $300 per week.[8]

Vocational Evidence-Micaela Black.

On July 29, 2004, vocational counselor, Micaela Black, performed a second Labor Market Survey. EX-9. Her deposition was later taken on October 3, 2005. EX-15. Ms. Black based her report on the medical reports of Dr. Willetts for 1-29-99 (EX-6) and 3-27-2002 (EX-7). Her report indicates that the claimant could perform the clerk, cashier and customer service jobs. Ms. Black found numerous positions available.

In her deposition, Ms. Black testified that Dr. Willetts' updated report in 2005 did not change her opinions of the types of work the claimant could perform. EX-15. pp. 8, 25, 31-32. Ms. Black noted that while Dr. Willets reduced Claimant's lifting restriction from 20 pounds to no more than ten pounds, at best only two positions were adversely affected, The job at Plas Pak Industries and Harold's Hallmark were no longer appropriate because they both indicated lifting of 20 pounds. However, she believed the rest of the jobs were still perfectly suitable. She personally viewed many of the positions listed in the labor market survey and was able to state that they were within Claimant's physical limitations. For those positions she did not personally

[8] In a letter dated February 2, 2005, vocational expert, Micaela Black, noted that these types of jobs paid median wages between $5.29 and $6.97 per hour in 1988. EX-10. In her deposition, Ms. Black noted that the wage range in 1998 would essentially be the same as that in 1995. Ms. Black also noted that the wage range in 1992 would fall somewhere between the 1988 and 1998 wage ranges. EX-15, pp. 18-19.

view she personally obtained information from the employer that allowed her to formulate an opinion that the positions were within Claimant's physical limitations. Ms. Black also knew of Claimant's involvement with managing the horseshoe club. She was aware of Claimant's involvement with the club's finances and computers EX-15, pp.25-27. However, she did not she did not identify as suitable alternate employment any managerial positions. Rather, the jobs she chose were non-skilled light to sedentary positions. She noted that Claimant's prior job was as a skilled worker. The jobs she found were essentially sedentary jobs in clerk, customer service and cashier positions. She believed Claimant's computer skills were sufficient for him to be able to be trained for whatever limited computer work would be necessary in these non-skilled entry level jobs. None of the jobs required a high school diploma or specific skills relative to the job. Ms. Black also noted that Claimant's age was not necessarily an impediment to obtaining these jobs. Many employers she deals with prefer more mature individuals as employees. Indeed one employer, Mystic Markets West, indicated that it preferred mature applicants for the Cashier/Customer Service position. EX-9. In addition to the wages being offered in 2004, Ms. Black provided median wages for entry level general clerk, hotel clerk, customer service and cashier in 1998. EX-9. She noted that the median wages for those jobs in 1992 would fall between the 1988 median wages stated in her February 2, 2005 letter (EX-10) and the 1998 median wages. EX-9, p. 6; EX15, pp. 18-19.

Vocational Evidence-Cherie King.

Ms. Cherie King is a vocational counselor whose deposition was taken on October 3, 2005. EX-16. Ms King's report is dated August 1, 2005. CX-4. She met with Claimant for two hours and reviewed various medical records, vocational records, labor market survey reports and deposition testimony of Claimant and work restriction forms. She found Claimant to be virtually unemployable due to: 1) Claimant's total lack of transferable skills; 2) Claimant's advanced age; 3) Claimant's questionable ability to work full time based on records and Claimant's statements; 4) the negative effects of medication on Claimant's ability to function; and 5) the fact that Claimant has not worked for ten years (CX-4). Upon cross examination, Ms. King noted that she did not consider Claimant's ability to obtain unskilled or semi-skilled jobs. She focused only on what she considered transferable skills pertinent to other skilled positions. EX-16, p.30. She also agreed that her analysis had nothing to do with a job search effort. EX-16, p.32. She was unaware that Claimant traveled to and from the horseshoe club daily during the six months per year it was open. EX-16, pp. 29, 30. Nor was she aware that this occurred seven days per week (TR30). Nor was she aware that Claimant travels 45minutes to an hour each way. EX-16, p.30. Nor was she aware that the club had been in operation for about ten years. EX-16, p.30. Nor was she aware that Claimant had the ability to network computers or had the skills to help individuals purchase their own computers on-line. EX-16, p.30. According to Ms. King, Claimant's ten years of traveling daily to and from and managing the horseshoe club would not in anyway counter his ten years of not being employed. Nor would it work in helping him to be considered dependable to a prospective employer. EX-16, pp. 32-33.

DISCUSSION

Permanent Total Disability v. Permanent Partial Disability

To establish a *prima facie* case of total disability under the Act, a claimant must show that he is unable to return to his pre-injury employment. The burden then shifts to the employer to show that suitable alternate employment is available for the claimant, given the claimant's physical and educational ability, age, and experience. If the employer then establishes the availability of suitable alternate employment, the burden then shifts back to the claimant to show that she diligently tried and was unable to secure employment. *Trans-State Dredging v. Benefits Review Bd.* (*Tarney*), 731 F.2d 199, 201-02, 16 BRBS 74, 76 (4th Cir. 1984). If the claimant is unable to show that she diligently searched for work but was unable to secure it, then at most her disability is partial, not total. *Southern v. Farmers Export Co.,* 17 BRBS 64 (1985).

Employer has conceded that the medical evidence in this case establishes that Claimant can no longer perform the duties of a stock room attendant at the shipyard (see Employer's Brief, p. 15). Moreover, Employer has conceded that Claimant is disabled due to the 1992 injury. Thus, Employer must now establish the availability of suitable alternate employment. The weight of the evidence in this case establishes that since April 15, 1999, Claimant has been only permanently partially disabled and has been capable of light duty work. As discussed below, Employer has established suitable alternate employment.

Claimant has not worked for Employer as a stockroom attendant since October 1, 1995. Claimant agrees that he established the Central Connecticut Horseshoe Club sometime in 1996 or 1997. During his first two visits with Dr. Willetts, in 1999 and 2002, respectively, Claimant described this as his own business. He reaffirmed describing it this way during his last visit with Dr. Willetts in 2005. In the initial two visits, Claimant noted that he actively worked in the business as much as 12 hours a day including computer work. Only during his last visit did Claimant describe this more as a club with only minimum work being done by him. During his hearing testimony, Claimant noted that this was an indoor horseshoe facility which he designed and constructed himself in order to allow the playing of horseshoes in the cold months from October through April. Claimant designed a computer program for the scoring of the matches and set up a computer network at the facility for the matches. He had total control of the operation. He handled all the finances. Everything was in his name. He set up leagues which played during the week and weekend tournaments held bi-weekly. There were approximately 75 members who paid annual dues of $50.00 per member. Claimant charged additional fees for the regularly scheduled weekend tournaments held twice each month. Claimant handled all the finances. All revenue generated was deposited in Claimant's personal bank account. He acknowledged working seven days per week. He commuted approximately 45 miles each way to and from work each day. Although he has no formal computer technical training, it is clear that Claimant has fairly sophisticated knowledge of computer usage. While Claimant maintains that this is a club rather than a business, I find the distinction not to be determinative of Claimant's ability to perform suitable alternate employment. Whether the enterprise is a business or a club, that it certainly qualifies as a fairly sophisticated operation conceived and run by Claimant. The evidence demonstrates considerable hands on management and work on a daily basis by Claimant notwithstanding his protests to the contrary.

The vocational opinion of Ms. Black appears quite well reasoned. She took the latest work restrictions of Dr. Willetts and determined Claimant was capable of light to sedentary work.[9] While she was aware of Claimant's managerial and computer related skills from his involvement with the horseshoe club, she did not attempt to identify higher paying managerial type jobs for Claimant. Although she noted that Claimant's last job as a tool room attendant was a skilled job, Ms. Black opined that Claimant presently could probably only qualify for lower paying non-skilled light duty entry level positions such as clerk, cashier and customer service representative. None of the jobs identified required a high school diploma or specific skills. Ms. Black estimated that in such entry level jobs in 1992 paid somewhere between the wage ranges identified in 1988 and 1998. [10]

Claimant relies on the medical opinions of Drs. Matza and Abramovitz as well as the vocational opinion of Ms. Cherie King in rebutting the opinions of Dr. Willetts and Ms. Black. Dr. Matza opined that Claimant was not capable of working at any substantial job. Yet he conceded that he was not aware that from October through April of each year Claimant drove between five and seven days per week back and forth between his home and the horseshoe club. Nor was he aware how many hours a day Claimant worked, that Claimant organized tournaments or what exactly Claimant did there. He was under the impression that Claimant just supervised and could rest at will. I find Dr. Matza's lack of knowledge regarding Claimant's activities at the horseshoe club troubling and ultimately fatal with regard to his opinion regarding Claimant's ability to work in any capacity. Since 1995, Claimant has run that facility. He designed and built the pits with his own hands. His daily devotion driving an hour each way to and from the club from October through April as well as the lengthy hours spent there each day more than attest to his ability to perform to some kind of work. Yet Dr. Matza dismisses all of this and deems Claimant totally disabled. This part of his opinion is simply not well reasoned.

Likewise, the opinion of Dr. Abramovitz with regard to Claimant's inability to perform any work is not well reasoned. Dr. Abramovitz attributes Claimant's non-employability to: 1) Claimant's neck and low back problems; 2) the amount pain medication Claimant takes; and 3) the fact that Claimant has been unemployed for almost nines years. Yet, Dr. Abramovitz makes no attempt to address whether Claimant's ten year work record at the horseshoe club might somehow count as working. Nor does he reconcile his belief that Claimant is incapacitated by pain medication with Claimant's ability to commute by car up to two hours each day, six months a year, and run the horseshoe club multiple hours each day. At best, Dr. Abramovitz simply did not know of Claimant's ten year involvement with the club. However, I do not find his opinion well reasoned because Claimant's ten year involvement with the horseshoe club certainly could impact two of the three reasons Dr. Abramovitz gives for Claimant being totally disabled.

Turning to the vocational opinion of Ms. King, I find it virtually worthless on the question of suitable alternate employment. Ms. King only focused on skilled position jobs. She

[9] Dr. Willetts also found Claimant capable of light duty work notwithstanding his work restrictions.

[10] Employer suggests that the more conservative 1988 wage range be used ($5.29 - $6.97). Employer further submits that a reasonable hourly wage rate to use for these entry level positions would be $6.00 per hour. The Presiding Judge agrees that this hourly rate is reasonable for these entry level jobs in 1992.

did not focus on the possibility that there may be semi-skilled jobs or non-skilled jobs which might constitute suitable alternate employment. The jobs identified by Employer were all entry level non-skilled jobs. She offered no opinion with regard to any of the identified jobs.

Based on the foregoing, I find that Employer has established suitable alternate employment. The burden now shifts back to the claimant to show that he diligently tried and was unable to secure employment. Claimant has not worked since 1995. He testified that he was offered a truck driver job by a friend but did not get the job because he could not sit for more than three hours at one time. Claimant never looked for work as either a cashier, customer service representative or inventory clerk. He has not applied for work at any of the area gambling casinos or at any of the area hotels. Nor has he applied for work at a Blockbuster Video Store. He readily admitted that since 1995, he has only applied for a couple of jobs. I find that this does not constitute diligence on Claimant's behalf.

THE CLAIMANT IS ENTITLED TO BENEFITS PURSUANT TO SECTION 8(e) OF THE ACT.

Based upon the fact that permanency was not raised by Claimant, the award in this case is limited to temporary partial disability. In addition, the award of benefits commences on April 15, 1999. This is consistent with Dr. Willetts' medical opinion on January 29, 1999 indicating the claimant was capable of light duty work and the fact that the first labor market survey was performed on March 16, 1999.

The stipulated average weekly wage for the 1992 injury is $821.17. As stated above, Employer has established suitable alternate employment at an hourly rate of $6.00. Therefore, the proper post-injury wage earning capacity is $240 per week based on a 40 hour work week. This would yield a loss of wage earning capacity of $$58 1.17 per week. This results in an award of temporary partial of $387.45 per week. This award would run through April 14, 2004.

Respondent voluntarily paid the claimant temporary partial disability on the 1995 claim for the period 4-4-1999 to 4-14-2004 at a rate of $493.53 per week, for a total of $128,910.03. EX-2. Respondent would be entitled to a credit of these payments against the award of temporary partial disability.

HAS CLAIMANT BEEN DENIED REASONABLE MEDICAL CARE BY EMPLOYER FOR HIS WORK-RELATED INJURY?

Claimant testified that Employer has recently refused reasonable medical care suggested by two physicians. Specifically, Claimant recalled that following a flare-up of neck problems in 2003, Dr. Abramovitz recommended further diagnostic tests which Employer refused to authorize.[11] Claimant further recalled that recently Dr. Maza had recommended another

[11] The medical records of Dr. Abramovitz show that in 2003 he did he did recommend an intracranial/extracranial MRA to better determine if there were a connection between Claimant's recent dizzy spells and Claimant's work-related cervical problems. There is no indication in Dr. Abramovitz records that this was ever authorized or performed.

myelogram for Claimant's lower back. Again Employer refused to either authorize or pay for the procedure.[12] Employer did not submit any contrary evidence to rebut Claimant's evidence. Nor did Employer address this issue in its post-hearing brief. I find that the evidence submitted by Claimant is sufficient to establish that Employer has denied reasonable medical care recommended by two physicians who have treated Claimant's work-related neck, shoulder and back problems for several years.

ORDER

It is hereby ORDERED that:

1. Employer shall pay to Claimant compensation for temporary partial disability pursuant with Section 8(e) of the Act in the amount of $387.45 per week, from April 15, 1999 through April 14, 2004.

2. Employer shall receive credit for all compensation that has been paid to Claimant.

3. All computations are subject to verification by the District Director.

4. Pursuant to Section 7 of the Act, the Employer shall provide payment for all past, present, and future medical bills incurred for treatment of Claimant's back impairment.

5. That Claimant's attorney shall, within 20 days of the receipt of this order submit a fully supported fee application, a copy of which shall be sent to opposing counsel, who then shall have ten (10) days to respond with objections thereto.

A

Daniel A. Sarno, Jr.
Administrative Law Judge

DAS/dh

[12] Dr. Matza confirmed that in June 2005, after he read a November 2004 MRI of Claimant's lower back, he recommended a CAT Scan and a myelogram of Claimant's back. He felt the myelogram would be useful in showing where any nerve root was being compressed and causing pain. He felt there was a good possibility that Claimant may need neck or back surgery. However, he noted that neither the CAT Scan nor the myelogram was ever performed.